

The Clery Act, VAWA and Title IX: Implication for Sexual Misconduct Response at Investigations

Wednesday, May 3, 2023 | 2:00 p.m. ET

Sponsored by



CUPA-HR Webinar

Presenter



Adrienne Meador Murray
Vice President,
Equity Compliance & Civil
Rights Services





D. Stafford & Associates & NAC

D. Stafford & Associates is a professional consulti specializing in campus safety and security, compliant misconduct response and investigation, and law ensures on college and university campuses in both States and Canada.

DSA conducts independent audits of Clery Act and Schools and Communities Act compliance, Sexual Misconduct/Title IX policy development and review and independent, trauma-informed investigations charassment, misconduct and interpersonal violence.

We also house the Procedural Justice Training Insti

NACCOP is the National Association of Clery Compland Professionals. It is a national association dedica practitioners of the many and nuanced requirements Act.



2023 Title IX Re 4 Hour Course

(INCLUDES COMPLYING WITH CLERY

June 12, 2023

12:00 pm - 4:00 pm Eastern Tim

June 15, 2023

11:00 am - 3:00 pm Eastern Tim

June 20, 2023

11:00 am - 3:00 pm Eastern Tim

June 21, 2023 (Focused on 2-year instit 12:00 pm - 4:00 pm Eastern Tim

Register now to save your space

LINK: NACCOP Title IX Classes – NACCOP

(https://www.naccop.org/naccop-title-ix-classes

NACCOP Member = \$290 / Non-Member = \$34



Objectives

- Understand the major requirements Clery Act (VAWA) and Title IX as the the VAWA offenses;
- Discuss implications of requirements institutional response; and
- Discuss readiness for new draft regarders preparing for impact/change/shift to responsibilities.

Poll Question

Is your institutional Title IX Policy and assoc procedure(s) also compliant with the VAWA Amendments (2013) to the Clery Act?

- o Yes
- o No
- o I'm not sure

Poll Question

Is your institutional NON-Title IX Policy and associated procedure(s) also compliant with the VAWA Amendments (2013) to the Clery Act?

(This is the policy and procedure you use to resolve all forms of sex-harassmer don't meet the threshold for Title IX. This includes, for most of you, student constudents) and EEO/Title VII policy for employees.)

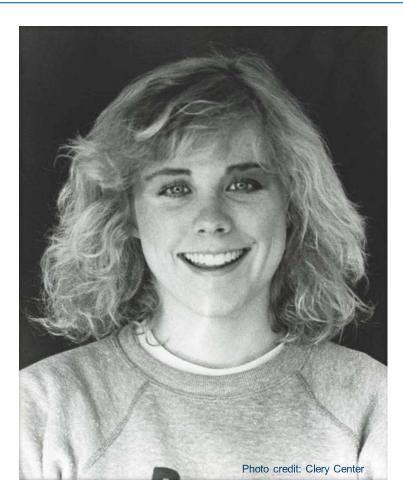
- Yes
- o No
- o I'm not sure

CUPA-HR Webinar

Have a Question?

Submit questions to our presenters using the Chat.

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act



Consumer Reporting Law

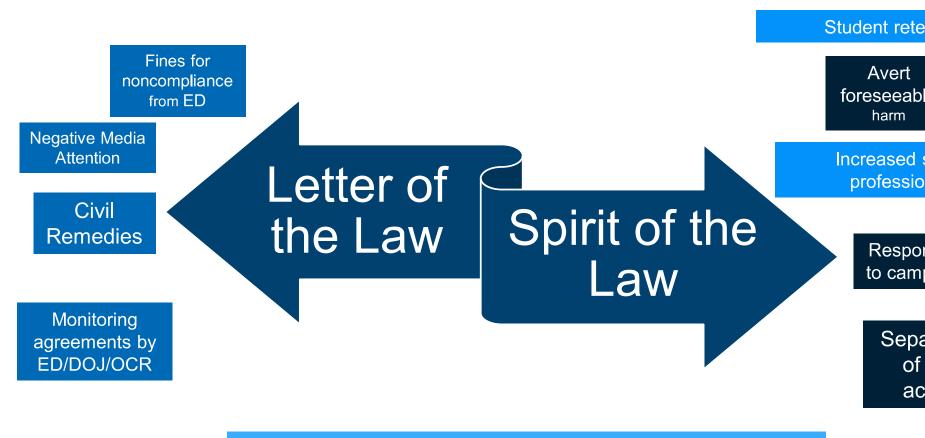
Title IX of the Education Amendmen



Photo credit: Time Magazine (online) Women's History Month 2018:

Anti-Discrimination in Education Law





By embracing both the spirit of the law as well as the letter of the law, we can create safer campuses AND avoid costly fines and reputational damage.

of

ac

Title IX of the Education Amendment o

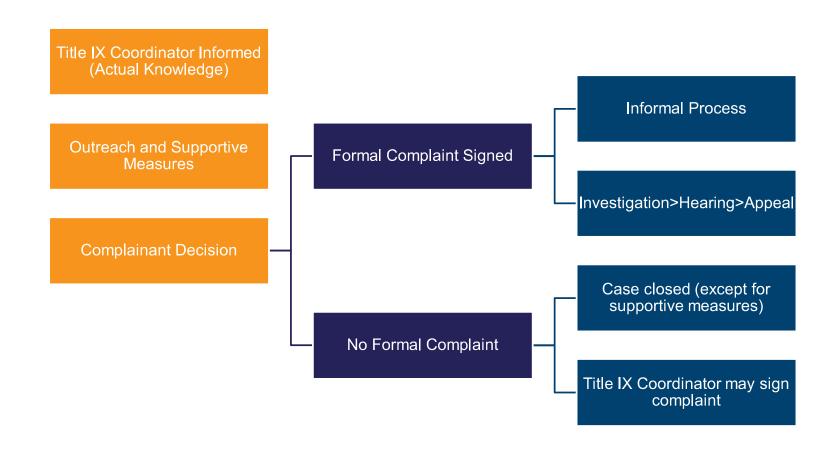
"No person in the United States shall, of the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance."

2020 Title IX Regulations (Discrimination on the Basis of Sex)

The goal of the 2020 Title IX Regulations is to require Title IV funded institutions to "promptly respond to individuals who are alleged to be victims of sexual harassment by offering supportive measures; follow a fair grievance process to resolve sexual harassment allegations when a complainant requests an investigation, or a Title IX Coordinator decides on the recipient's behalf that an investigation is necessary; and provide remedies to victims of sexual harassment." (Summary of the Major Provisions of This Regulatory Action; Federal Register)



2020 Title IX Case Flowchart-Wh we are now...





NEW! APRIL 2023

ATHLETIC NPRM



The four key takeaways from the Athletics NPRI

- 1. Any blanket ban on transgender athlete participation consistent with their gender identity will be considered Title IX.
- 2. Any criteria adopted to limit or deny a student's eligi participate based on their gender identity will have to substantially related to the achievement of an importa objective, such as preventing sports-related injuries or athletic competition.
- 3. Few, if any, sex-related eligibility criteria for elementa school athletics participation will comply with Title IX.
- 4.Any exclusionary policies will have to be carefully craaddress the particular concerns of the sport, grade and level, and level of competition at issue. No one-size-fits will be permissible.

Sources: https://www.ed.gov/news/press-releases/fact-sheet-us-department-educations-proposed-change-its-title-ix-regulations-students-eligibiteams#:~:text=Today%2C%20the%20U.S.%20Department%20of%20Education%20is%20releasing,longstanding%20goal%20of%20ensuring%20goal%20go

tps://www.bclplaw.com/en-US/events-insights-news/department-of-educations-new-proposed-rule-for-transgender-participation-in-athletics.htm

PROPOSED Major Changes to 2020 Regs (anticipated May 2023)

Jurisdiction

Definitions

"Responsible employees"

Duty to respond

Complaint vs "signed formal complaints"

Role of advisor of choice

Supportive measures

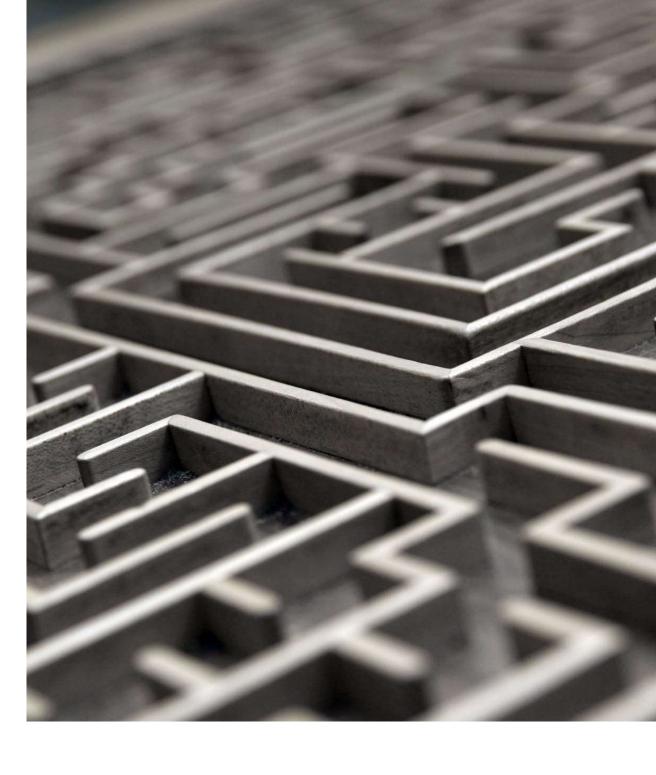
Separation of duties

Live hearings

Notice requirements

Pregnancy, Parenting, Associated Medical Conditions





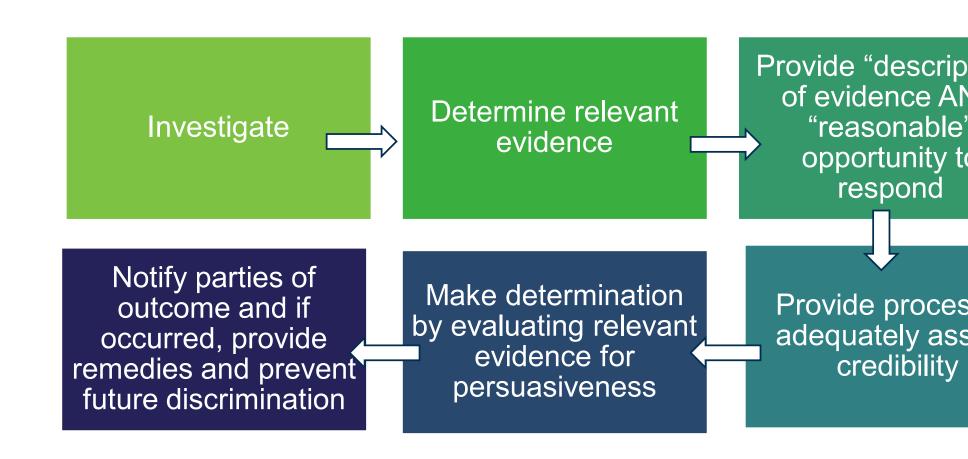
Key Anticipated Changes 2023: Two Grievance Procedures



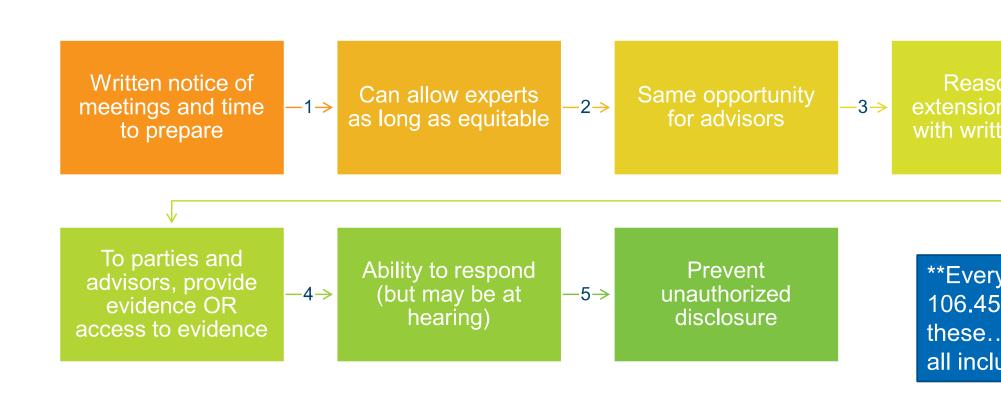
Sexual
Harassmer
involving stude
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OR responde

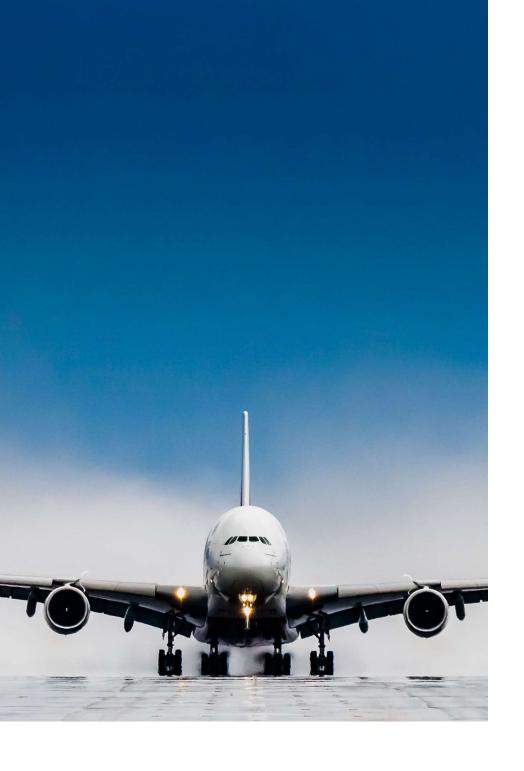
Procedur 106.46

New Proposed 2023 106.45-<u>Sex</u> <u>Discrimination</u> Grievance Procedures



New Proposed 2023 <u>106.46-Sex-base</u> Harassment Grievance Procedures





Jurisdiction of Title

A recipient has an obligation to a sex-based hostile environment its education program or activity sex-based harassment contribute the hostile environment occurred outside the recipient's education program or activity or outside the States.

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Pregnancy and Parental Status Discrimination 2023 Draft: Intent

"The Department describes its proposed revisions the Title IX regulations related to pregnancy or related to conditions as well as sex discrimination related to marital, parental, and family status, to provide clar to recipients about their obligation not to discriminagainst students or employees who are pregnant experiencing pregnancy-related conditions.

Parental Status

"Parental status, as used in §§ 106.21(c)(2)(i), 106.37(a)(3), 106.40(a), and 106.57(a)(1), means the status of a person who, with respect to another person who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability, is:

- (1) A biological parent;
- (2) An adoptive parent;
- (3) A foster parent;
- (4) A stepparent;
- (5) A legal custodian or guardian;
- (6) In loco parentis with respect to such a person; or
- Actively seeking legal custody, guardianship, visitation, or adoption of such a person."



Parental, family, or marital status; pregnancy or related conditions means









Pregnancy or related conditions r

- Pregnancy, childbirth, termina pregnancy, or lactation;
- (2) Medical conditions related to pregnancy, childbirth, termina pregnancy, or lactation; or
- (3) Recovery from pregnancy, che termination of pregnancy, lac their related medical conditio



Pregnancy Leave

"In the case of a recipient that does not leave policy for its employees, or in the employee with insufficient leave or accruemployment time to qualify for leave undepolicy, a recipient shall treat pregnancy conditions as a justification for a voluntary absence without pay for a reasonable petime, at the conclusion of which the employment are instated to the status held when the began or to a comparable position, with decrease in rate of compensation or loss promotional opportunities, or any other reprivilege of employment." (Proposed 106)



Lactation

Institutions must provide reasons break time for an employee to ex breast milk or breastfeed as nee

Employees will continue being p

Institutions must ensure the available of a lactation space, which must space other than a bathroom that clean, shielded from view, free front intrusion from others, and may be by an employee for expressing.

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And, reconciling all of the with requirements found Pregnant Workers Fairn (in effect June 27, 2023) the FLSA as extended by PUMP Act....

And, training, training, and more employee training!





How do your institution policies, procedure practices align with CURRENT requirer

Remember, even with IX Regs, the VAV Amendments to Clean unchanged at this to the control of the

Key Requirements of the Clery A



Collect, classify, and count crime reports/statistics



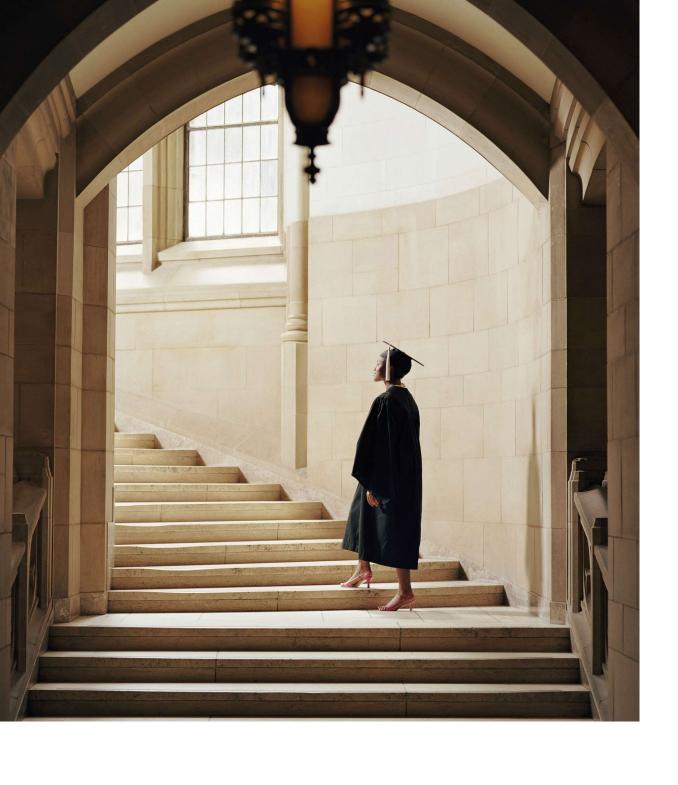
Public disclosures-Timely Warning Notices and Emergency Notifi



Publish Annual Security Report



Submit crime statistics to the Department



COUNTIN CRIME STATISTI



Three Part Test

- 1. Was the crime reported to a Security Authority?
- 2. Is the crime a Clery Act crime?
- 3. Did the crime occur on or with institution's reportable Clery go

Campus Security Authorities (CSA)

Campus police/security

Security responsibility

Individual or organization or crimes should be reported

An official with responsibil student and campus activi

Who is <u>never</u> a CSA?



Professional Counselors





A CSA'S FUNCTION IS TO REPORT ALLEGATIONS OF CLERY ACT CRIMES MADE IN GOOD FAITH.

Clery Act: Employee Reporting Considerations



Clery Act--CSAs

Campus police department

Those responsible for security

Individuals to whom crimes should be reported

"Officials with significant responsibility for student and campus activities"

Local law enforcement



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This Photo by Unknown Au





I am a "Super CSA!" That means that my institution can expect most, if not all, reports of sexual misconduct will be reported to me instead of police.



TITLE IX AS SUPER CSA

*Where do most reports of sexual adding violence, domestic violence astalking get reported?

*When they are reported to EEO/Equity/Conduct/HR/Title IX, ho those reports reported to the institut CCO?

*Are they reported in a timely way?
*Did your institution have the opport

fulfill it's federal Clery Act reporting requirement?

Reporting Considerations



Title IX - "Officials with authority"

Title IX Coordinator

Official(s) who can institute corrective measures on behalf of the school

Any other person who is designated by the institution as a person who shall report

Clery Act - CSAs

Campus police department

Responsible for security

Individuals to whom crimes s be reported

"Officials with significant responsibility for student and campus activities"

Local law enforcement

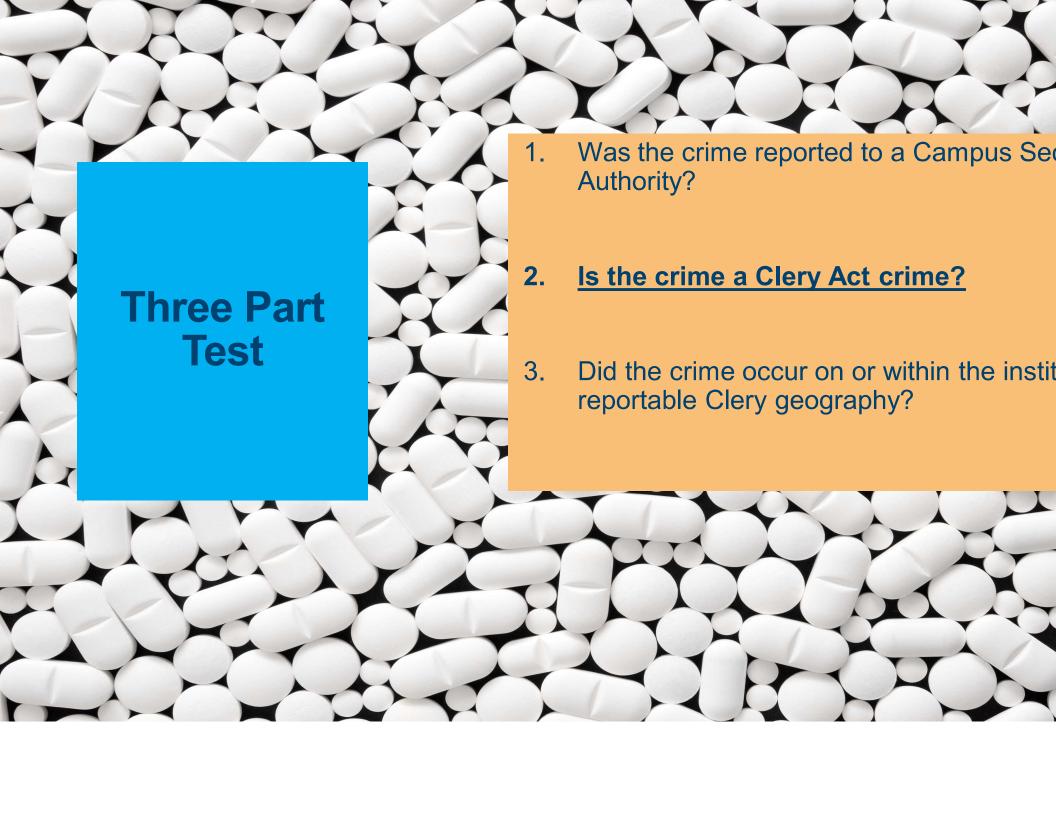
(Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act)

Calendar Years (CY) 2016 - 2018

Criminal Offenses or Primary Crimes (Crimes Reported By Hierarchy)	Calendar Year	On Campus (Including Residential)	Non- Campus	Public Property	Totals	On Campu (Residentia Only)
Murder & Non -Negligent Manslaughter	2018	0	0	0	0	0
	2017	0	0	0	0	0
	2016	0	0	0	0	0
Manslaughter by Negligence	2018	0	0	0	0	0
	2017	0	0	0	0	0
	2016	0	0	0	0	0
Rape	2018	11	2	0	13	11
	2017	25	2	0	27	18
	2016	14	2	0	16	10
Fondling	2018	11	1	0	12	9
	2017	4	1	0	5	4
	2016	0	3	0	3	0
Incest	2018	0	0	0	0	0
	2017	0	0	0	0	0
	2016	0	0	0	0	0
Statutory Rape	2018	0	0	0	0	0
	2017	0	0	0	0	0
	2016	0	0	0	0	0
	2018	0	0	0	0	0
Robbery	2017	0	0	0	0	0
	2016	0	0	1	1	0
Aggravated Assault	2018	3	0	2	5	1
	2017	4	0	0	4	4
	2016	3	1	0	4	3
Burglary	2018	32	9	0	41*	31
	2017	7	1	0	8	6
	2016	3	1	0	4	1
Motor Vehicle Theft	2018	0	0	0	0	0
	2017	0	0	0	0	0
	2016	0	0	0	0	0

COUNTII CRIME STATIST

CLERY C





Primary Crimes



Hate Crimes

- රීර්
- Arrests and Referrals for Drug, Liquor, and Weapon Violations
- 6

Dating Violence, Domestic Violence, and Stalking Incidents (VAWA C

Clery Crime Categories

Clery Reportable Crime Categorie

Murder/Non-negligent Manslaughter*

Manslaughter by Negligence*

Sex Assault*

- Rape
- Fondling
- Incest
- Statutory Rape

Robbery*

Aggravated Assault*

Burglary*

Motor Vehicle Theft*

Arson*

Arrests and Disciplinary Referrals fo

- Liquor
- Drugs
- Weapons

Domestic Violence

Dating Violence

Stalking

Hate Crimes for *, plus

- Larceny-Theft
- Simple Assault
- Intimidation
- Destruction/Damage/Vandalism of

Counting Clery Crimes

If a crime is <u>reported</u> (and otherwise meets the three-part test) it is <u>counted</u>.

- Includes attempts
- Includes cases a DA would reject
- Includes cases of "not responsible"
- Does NOT include every conduct code violation

It is not the word used but the facts of the case that determine how it gets counted



COUNTIN CRIME STATISTIC

CLERY GEOGRA

Three Part Test

01

Was the crime reported to a Campus Security Authority?

02

Is the crime a Clery Act crime?

03

Did the crimoccur on or within the institution's reportable C geography?

CLERY GEOGRAPHY

On Campus (& On-Campus Resident

Public Property

Non-campus building or property

Geography (Clery) versus Jurisdiction (Title IX)

Geography is the defined physical area in which the Clery Act attaches. A crime MUST occur within the institution's physical Clery geography to be captured.

Jurisdiction generally de authority to apply law to a area and/or to certain perso example, under Title IX, an not physically occur on cabut if it occurs within ce programs between certain Title IX attaches.



Public Disclosures



Daily Crime Log



Annual Security Report (ASR)



Emergency Notifications/Timely Warning Notices

Timely Warning/Emergency Notification

	TIMELY WARNING (TWN)	EMERGENCY NOTIFICATIO	
Legal Standard:	Serious or continuing threat	Immediate threat to health and safety	
Circumstance:	Clery-reportable crimes that have been reported (occurred in past)	Clery-reportable crimes as well as othe emergencies (happening right no about to happen)	
Audience:	Community-wide	Can send to a segment of the community, if appropriate	
When Issued:	As soon as pertinent information is available	Upon confirmation of emerge (when possible)	
Follow-Up:	Not Required	Required	



Amended Notice

When you amend your Not Investigation to include allegations, are you ensure prompt reporting to your institution's Police/Public Safety unit for inclusion newly reported Clery critical contents.

Timely Warning Decisions

It DOE negate risk becau victin their a

<u>EVERY</u> Clery-reported crime must be assessed on a case by case basis for timely warning purposes

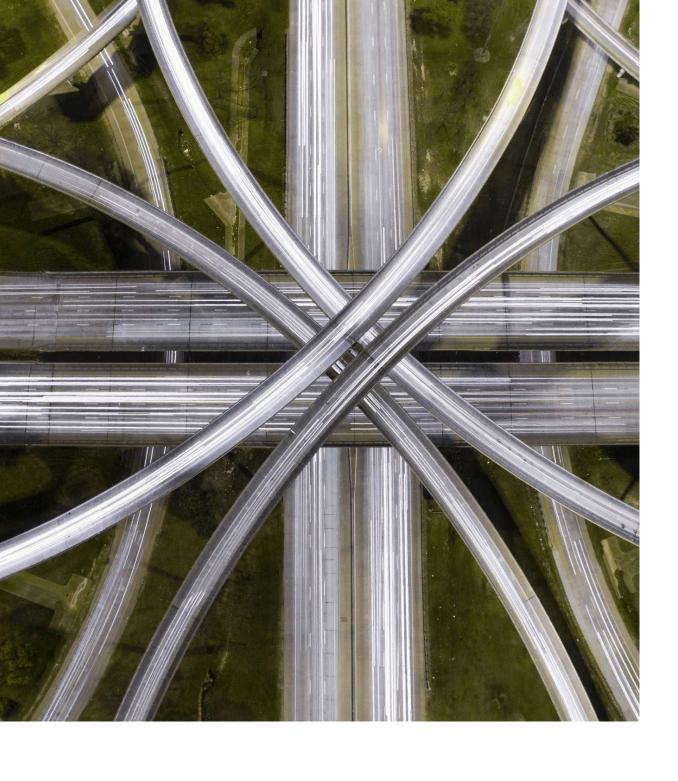


The continuing danger to the campus community

Confidentiality

VAWA REQUIREMENT: TW reshall be provided to students employees in a manner that it timely, that withholds the name victims as confidential.

There is no requirement to with the perpetrator's identity.



PROCESS INTERSECTI



Clery-VAWA-Written Explanation of Student or Employee's

(b)(11)(vii) "When a student or empression to the institution that the student or employee has been a victim of dativiolence, domestic violence, sexual or stalking, whether the offense occor off campus, the institution will prestudent or employee a written explain the student's or employee's rights a options, as described in paragraph (b)(11)(ii) through (vi) of this section

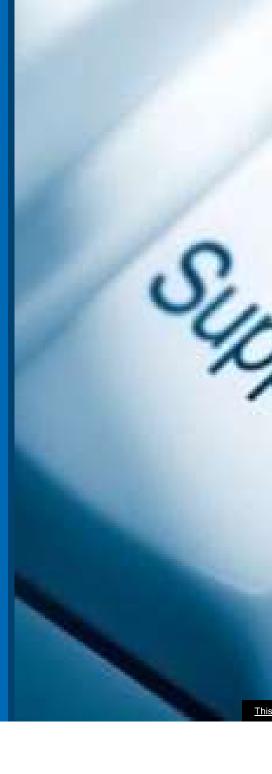


- The importance of preserving evid may assist in proving that the alleged offense occurred or may be helpful in a protection order
 - Not required but recommended: Where to forensic exams, contact info, does not require report and can have exam now, decide late
- 2. How and to whom the alleged offe should be reported
 - List any person or organization that can assi
 - Recommended: Also include community org

- 3. Notification of the victim's option to
 - Notify proper law enforcement authorities, including on-campus and local police
 - n Be assisted by campus authorities in notifying law enforcement authorities if the victim so chooses
 - Decline to notify such authorities
- 4. The rights of victims and the institution's responsibilities for
 - n Orders of protection
 - n "No contact" orders
 - n Restraining orders
 - Similar lawful orders issued by a criminal, civil, tribal, or institutional



- 5. To students AND employees about existing:
 - Counseling, health, mental health services
 - Victim Advocacy
 - Legal Assistance
 - Visa and Immigration Assistance
 - Student Financial Aid
 - Other services available for victims
- 6. Options for, available assistance in, and how to request changes to (if requested and reasonably available)
 - Academic, living, transportation, working



7. Confidentiality

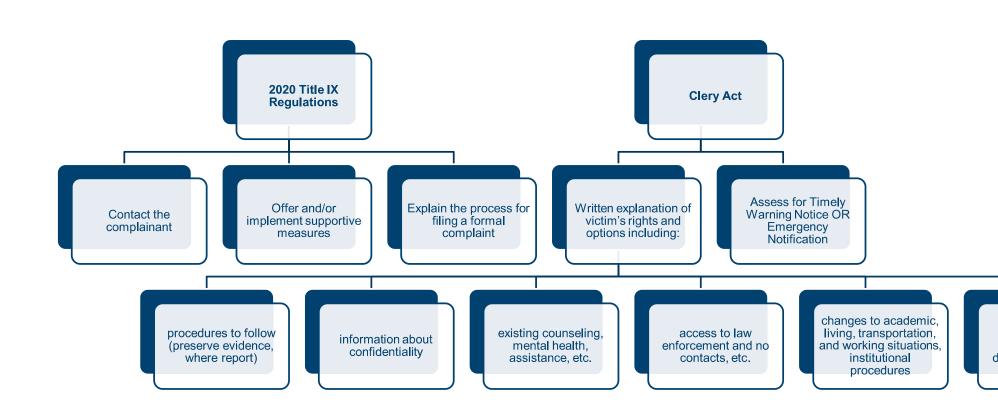
- Publicly available recordkeeping has no personally identifying information about the victim (not required for respondent but best practice in most cases)
- Accommodations and protective measures are confidential (to the extent they can be without impairing the ability to provide them)

8. Disciplinary Procedures

 An explanation of the procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, or stalking, as required



Response to "Actual Knowled





Clery Requirements Disciplinary Procee

Anticipated timelines ("reasonab

Decision-making process

How to and options for filing a so complaint (with contact info)

How school determines which pr

Who makes decisions

Include employee procedures

Use procedures regardless of Cl geography

Advisors Per the Clery Act

- *Provide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice
- *Not limit the choice of advisor or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding; however, the institution may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties



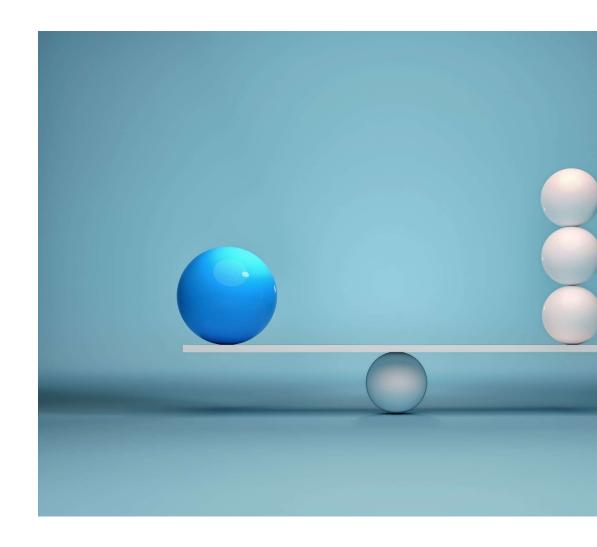
STANDARD OF EVIDENCE

2020 Title IX Regulations

- Either the preponderance of the evidence standard or the clear and convincing standard
- Must be the same for all sexual misconduct

Clery Act

- Any standard of evidence ... must include in policy
- Would not prohibit using different standards for different groups



Informal Resolutions

2020 Title IX Regulations

- Can offer, but may not require
- Not allowed for "employee on student" sexual harassment
- Party may withdraw up to a point

Clery Act

 Written information about procedures the institution will follow for VAWA (does not differentiate between formal vs informal)

Formal Complaint Rights

2020 Title IX Regulations

- Treat equitably with goal to restore/preserve education; due process for respondent
 - Include presumption of not responsible
 - Include any discipline for false statements
- Reasonably prompt time-frames*
 - Describe the <u>range</u> of sanctions
 - Describe range of supportive measures

Clery Act

- Prompt, fair and impartial investigation and
 - Anticipated timeframes
 - List <u>all</u> possible sanctions for each offens (employees and students)
 - Consistent with policy and transparent
 - Not required to list all protective measures

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Formal (Live Hearing)

2020 Title IX Regulat

 Requires live hearing with examination by advisor
 2022 Proposed-Live heari made available but not red

Clery Act

Clery is silent regarding live hearing

2020 Written Determination



Title IX

Identification of the allegations

Procedural steps taken from receipt through determination

Findings of fact supporting the determination

Conclusions regarding the application of code of conduct to the facts

Result (responsibility, rationale, sanctions, remedies for each allegation)

Appeals procedures

When results become final (post appeal)

Clery Act

Result (include any sanctic rationale for results and sa

Appeals procedures

Any change to the result

When such results become

CLERY-VAWA-BIAS FREE AND TRAINING FOR "OFFICIALS" (INCLUDING CAMPUS POLICE, T9, HR, ETC...)

Annual training on the issues related to dating violence, domestic violence, sexual assault and stalking and on how to conduct an investigation and hearing process that protects the safety of the victims and promotes accountability



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CLERY REQUIREMENTS FOR OFFICIALS

Training must be described in ASR

***Annual

Should include (at a minimum):

- Relevant evidence and how it should be used
- Proper interview techniques
- Basic procedural rules for conducting a proceeding
- Avoiding actual/perceived conflicts

Can be in person or electronic (webinar or video)



Appeals

2020 Title IX Regulations

- Must offer both parties an app
- Based on specific grounds

Clery Act

- Not required (but must provide notice if allowed along with ap procedures)
- Simultaneous written decision describing result, sanction, an changes to the result, when it becomes final

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Recordkeeping

2020 Title IX Regulations

7 years

Clery Act

 Retain all records to compiling ASR for a years from the late publication of the re which they apply (in years)

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What do I do now?

- 1. Do you have a <u>Clery Compliance Committee</u>? If so, are you a member? (If not, why not?)
- 2. Ensure all Title IX and non-Title IX (but sex) policies and procedures comply with the Clery Act.
- 3. Ensure Title IX team members understand their obligations as CSAs to report Clery reportable offenses to the reporting structure of the institution.
- 4. Ensure HR, Title IX, Student Conduct, Campus Police, etc. are ALL providing victim's of VAWA offenses witl Written Explanation of Rights and Options (*) (and, how is this being documented?) This document is IN AD to Title IX rights or state criminal justice system rights....
- 5. Ensure when you update policies/procedures this summer in compliance with new regs, that you are workin your Clery Compliance Officer to ensure compliance in your institution's Annual Security Report, webpages, key groups on campus.
- 6. Come to zoom or in-person summer training! Stay tuned for classes specific to key topics pertinent to HR ar IX! Register at www.naccop.org and www.dstaffordandassociates.com

Visit https://www.naccop.org/general-resources and look at "NACCOP Whitepaper and Resources" for info on Clery Comp VAWA compliance, and more.

*This resource is provided to NACCOP members only via the Annual Journal. For membership, visit <u>Join – NACCOP</u>. (NAC free webinar series on key topics as part of annual membership.)



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(INCLUDES COMPLYING WITH CLERY

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Register now to save your space

LINK: NACCOP Title IX Classes – NACCOP

(https://www.naccop.org/naccop-title-ix-classes

NACCOP Member = \$290 / Non-Member = \$34



Thank You

Please complete your event evaluation

